COMMENT AND BOOK REVIEW

INCOMPLETE THEORIZING IN THE HIGH COURT

Adrienne Stone[*]

Review Essay: Cass R Sunstein, *Legal Reasoning and Political Conflict*

INTRODUCTION

Cass Sunstein's recent book, *Legal Reasoning and Political Conflict*,[1] draws together much of his recent work on judicial decision-making. In this refreshingly accessible account, his particular concern is the problem of legal decision-making in a diverse society. Although at its most general the book addresses all legal decision-making, Sunstein's principal concern is judicial decision-making,[2] and I will discuss it in that context. The book covers much ground but the most important and original feature of his argument is his description and defence of "incompletely theorized agreements".[3] In Sunstein's view, a central and desirable feature of legal reasoning is the use of agreements which do not contain a complete account of the underlying theories or principles which justify them.

A second major portion of the book contains Sunstein's consideration of the debate over the use, in legal decision-making, of rules versus more open ended standards. The book concludes with Sunstein's review of the legal interpretation debate and a short explication of his preferred approach to constitutional and statutory interpretation. In this short review, my principal interest is his account of incompletely theorized agreements. Therefore, except where they illuminate that part of his argument, I do not propose to discuss those later sections in detail. In the final part of this review, I will consider the relevance of Sunstein's approach to judicial decision-making to some recent developments in the High Court of Australia.

---

* BA (UNSW), LLB (UNSW), LLM (Colum). Thanks are due to Anne-Marie Allgrove for her patient and insightful review of an earlier draft.

1 C R Sunstein, *Legal Reasoning and Political Conflict* (1996).

2 Ibid at 39.

3 Ibid at 35-61.

INCOMPLETELY THEORIZED AGREEMENTS: THE ARGUMENT

Sunstein identifies several ways in which agreements might be incompletely theorized. One form of incompletely theorized agreement is an incompletely specified agreement. This occurs where there is agreement on a general principle but not a specific application. To take his example, we may favour racial equality but disagree over a specific policy like affirmative action.[4] Agreement created in this way, as Sunstein acknowledges, resembles John Rawls' theory of overlapping consensus: the reaching of consensus by emphasis on a shared commitment to principles of justice.[5]

However, Sunstein is particularly interested in circumstances, which may often arise in diverse societies, where "decisions must be made rapidly in the face of apparently intractable social disagreements on a wide range of basic principles".[6] So, most pertinent to his argument are incompletely theorized agreements which consist of agreements on particular outcomes and on low-level or narrow principles which justify them, but which lack agreement on a high level justification. His example is again drawn from American constitutional law. He postulates that we might agree that the First Amendment protects the right of Nazis to march in a Jewish neighbourhood of Chicago[7] and perhaps also on the relatively more abstract principle that once governed First Amendment law, that speech can only be regulated when "the words are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent",[8] without agreeing, or perhaps even having, a general theory justifying freedom of speech.[9]

Sunstein's argument in defence of incompletely theorized agreements, in this form, is that a completely theorized account of every legal decision is both impractical and undesirable. Among the practical obstacles to completely theorized agreements is the difficulty of obtaining agreement in multimember organisations, such as appellate courts. Incompletely theorized agreements allow multimember institutions to reach decisions despite divergence on high level propositions.[10] They are also useful to other courts. All courts have limited time and capacity which may make the resolution of important theoretical issues impractical.[11] Further, incompletely theorized agreements are suited to a court's responsibility to take notice of precedent. Unlike some more ambitious theories, they maintain a place for decided cases.[12]

These features give incompletely theorized agreements social value as well. Returning to his concern with law-making in a diverse society, Sunstein argues for incompletely theorized agreements on the basis that they allow for the resolution of disputes without creating enduring disagreements over fundamental principles. With

---

4 Ibid at 35.
5 J Rawls, *Political Liberalism* 133-72 (1992); See C R Sunstein above n 1 at 4.
6 C R Sunstein, above n 1 at 4.
7 Sunstein's reference here is to the controversy which occurred in 1977-78 surrounding the plans of a Nazi organisation to demonstrate in a Chicago suburb. For an account of the controversy, see D Hamlin, *The Nazi/Skokie Conflict: A Civil Liberties Battle* (1981).
8 *Schenck v United States*, 249 US 47, 51 (1919).
9 C R Sunstein, above n 1 at 37.
10 Ibid at 39-40.
11 Ibid.
12 Ibid.

incompletely theorized agreements, "losers can submit to their legal obligations ... without being forced to renounce their largest ideals".[13] Incompletely theorized agreements are, therefore, well suited to a world with diverse views, allowing people to live together and "to show each other a high degree of mutual respect, civility, or reciprocity".[14] At its most abstract, Sunstein's point is that human morality is not reducible to a single value and consequently it is unrealistic to make such a demand of law.[15]

Sunstein's second line of defence of incompletely theorized agreements is that high level theory is better suited to the democratic arms of government. The distinction Sunstein draws between the judiciary and the other arms of government, in this regard, is partly based on scepticism of the institutional capacity of courts to bring about the large-scale social reforms often required when they take high level theoretical positions. In addition to their limited capacity to fashion and enforce solutions, courts "may produce unfortunate systemic effects, with unanticipated bad consequences that are not visible to them at the time of decision, and that may be impossible for them to correct thereafter".[16] Finally, the most fundamental point Sunstein makes in favour of incompletely theorized agreements stresses a link to the rule of law. The adoption of high level theory to justify legal decision-making is likely to involve the judge in making a personal determination of the right and the good. So, Sunstein argues, "[t]he presumption against high level theories is an aspect of the ideal of the rule of law to the extent that it is an effort to limit the exercise of discretion at the point of application".[17]

Despite this defence of incompletely theorized agreements, Sunstein acknowledges a place for theoretical concerns in legal reasoning. First, he does not, as one of his critics suggests,[18] think that legal decision-making can be conducted without any understanding of abstraction. He accepts, for example, that the drawing of an analogy is underscored by some theoretical understanding. As he explains, "analogizers cannot reason from one particular to another particular without saying something at least a little abstract. They must say that case A was decided rightly *for a reason*, and they must say that that reason applies, or does not apply, in case B".[19] To take one of his own examples, Sunstein suggests that many people will agree that a ban on speech imposed on a Communist is "like" a ban on speech imposed on a member of the Ku Klux Klan and should be treated similarly, even if they disagree about the general foundations of freedom of speech.[20] As Sunstein would acknowledge, two people who find agreement in this way will have some kind of general justification for reaching the conclusion that the two cases are alike. Both, perhaps, agree on the principle that political speech, even extreme and offensive political speech, deserves protection. However, Sunstein's point is that they may disagree at a more fundamental level. One person might support this position because of a belief that the ultimate goal of freedom of speech is to support

13 Ibid at 41.
14 Ibid at 39-40.
15 Ibid at 43.
16 Ibid at 45.
17 Ibid.
18 See L Alexander, "Incomplete Theorizing: A Review Essay of Cass R Sunstein's Legal Reasoning and Political Conflict" (1997) 72 *Notre Dame L Rev* 531 at 535-538.
19 C R Sunstein, above n 1 at 63 (emphasis in original).
20 Ibid at 38.

democratic government. Another might believe in the protection of speech under the much broader principle that freedom of speech exists to ensure maximum personal autonomy. By expressing their agreement in terms of a relatively specific principle (the protection of political speech) people can avoid the need to settle upon a justification for freedom of speech at this higher level.[21]

Second, Sunstein does not doubt that there will be circumstances in which high level theorizing might be appropriate for courts. He concedes that reference to broader principle is useful in testing our judgments and in eliminating inconsistency.[22] Indeed, one way to see an incompletely theorized agreement is as "an early step towards something both wider and deeper".[23] Part of the value of incompletely theorized agreements, then, is that they assist in the development of a theory. A good theory is likely to be developed "through generalizing and clarifying incompletely theorized outcomes and doing so by constant reference to concrete cases, against which the theory is judged".[24] He concludes by "declining to endorse ... a claim that incompletely theorized agreements are always the appropriate approach to law. ... What makes sense is a more modest point ... Judges should adopt a presumption rather than a taboo against high-level theory".[25]

COMMENT

The costs of incomplete theorization

For all its virtues, however, incomplete theorization comes at a cost. Indeed, its very virtue, the avoidance of theorization, also suggests the most serious arguments against it.

One troubling feature of incompletely theorized decision-making is that it brings with it a failure to articulate underlying theoretical concerns. As we have seen, Sunstein agrees that abstract concerns underlie agreements that are expressed in incompletely theorized terms. To return once more to his example, behind the agreement to protect the speech of a Ku Klux Klan member, is a belief in the protection of political speech. Moreover, although the decision-maker may only be able to express this belief in relatively specific or low-level terms, a complete justification would, of course, require a more ambitious statement.[26]

Once it is acknowledged that incomplete theorizing is underscored by something more abstract, then it must be seen that Sunstein is advocating a strategy which will often leave these motivating concerns unexamined. This lack of examination might especially concern us if the theoretical concerns are ones with which, on reflection, we would disagree. This gives rise to the objection that incomplete theorization might

---

21 For discussions of arguments justifying freedom of speech, see generally, F Schauer, *Free Speech: A Philosophical Inquiry*, 35-46 (1981); K Greenawalt, "Free Speech Justifications", (1989) 89 *Colum L Rev* 119 and 145-146.

22 C R Sunstein, above n 1 at 51.

23 Ibid.

24 Ibid at 56.

25 Ibid at 56-57.

26 See above nn 20-21 and accompanying text.

undermine appropriate development of the law by discouraging the examination, and consequent understanding, of those concerns.[27]

The troubling failure to articulate the motivating concern of judicial decision-making is compounded by arguments that resolution of important matters of theory is a valuable judicial task, especially for high appellate courts. Where a court plays a very significant role in determining the shape of the law, a clear statement, at a relatively high level of abstraction, of the court's underlying concern might be necessary to give lower courts, legislators and litigants an idea of the likely direction of the law. On certain matters, moreover, the importance of a theoretical position might make its explanation desirable. In the United States, for example, it has been argued that free speech is an area in which strong statements of underlying values by the Supreme Court are an important element of its protection.[28]

Such costs seem to be unavoidable results of incomplete theorizing. The lack of theoretical ambition, the very feature which gives incomplete theorization its virtues, leads to this corresponding failure to articulate and emphasise theoretical points. These concerns, then, can only be directly answered by considering the countervailing benefits of completely theorized agreements. Sunstein's argument requires, therefore, a demonstration that the diverse benefits of incomplete theorizing are worth incurring these costs.

Justification for incomplete theorization

Sunstein's approach to this problem is most usefully illustrated towards the end of the book in his discussion of constitutional interpretation.[29] Consistently with the rest of his book, Sunstein advocates a cautious, incremental approach to constitutional interpretation which avoids large scale theoretical statements. By way of illustration, he considers the Supreme Court's protection of the right to an abortion on the basis of a constitutionally grounded right to privacy, arguing that the Supreme Court would have done better to avoid a decision on abortion of the breadth of *Roe v. Wade*[30] by finding narrower grounds on which to invalidate the anti-abortion statute at issue in that case.

Sunstein is not unaware of the potential costs of this approach. Indeed, it appears he is broadly sympathetic to a right to an abortion and acknowledges that the tendency of abortion laws to discriminate against women may provide a satisfactory theoretical justification.[31] Nonetheless, he advocates an incompletely theorized approach relying on the countervailing benefits of incomplete theorization.

The first of these benefits is social cohesion. As is well known, in the United States, abortion rights have been a source of intense social conflict.[32] A decision on a narrower, incompletely theorized basis would, in Sunstein's view, have been much less

---

27 See S J Shapiro, "Fear of Theory", (1997) 64 *U Chic L Rev* 389 at 396.

28 See V Blasi, "The Pathological Perspective and the First Amendment" (1985) 85 *Colum L Rev* 449 (1985).

29 C R Sunstein, above n 1, ch 8.

30 410 US 113 (1973).

31 C R Sunstein, above n 1 at 180.

32 For a recent manifestation of this turmoil, see *Schenck v Pro-choice Network of Western New York*, 117 S Ct 855 (1997).

controversial. The Court could have ruled that the law in *Roe* was invalid and left open the possibility that some abortion restrictions were permissible. This approach, he argues, "could have gathered wider social consensus and thus fractured society less severely".[33]

Sunstein's second point is that the right to an abortion should primarily be protected through the democratic process. As we have seen, part of his argument for preference for the democratic process is based on his belief that a narrow judicial role places appropriate restraints on courts.[34] Consequently, he argues that the evolution of a right to an abortion principally by the democratic arms of government, with restrained judicial intervention, "would have been much healthier for democratic processes".[35] He also makes an argument for deference to other arms of government based on his scepticism of the capacity of courts to make high level theoretical decisions. So, in the case of the right to an abortion, leaving the process of determining fundamental principles to the democratic arms of government may have allowed them "to find their own creative solutions acceptable to both parties ... with the possible conclusion, from democratic sources, that the right to sex equality is broader than the Court ... understands it".[36]

At each of these points there are arguments against Sunstein. First, there is a challenge to the value which he places on social cohesion. Although it is easy to see some value in social cohesion, this does not mean that the protection of social cohesion should be preferred over other concerns. So even if a narrow, incompletely theorized decision in *Roe* would have avoided social conflict, it may be that protection of the right to an abortion is worth a degree of social division.[37] Further, Sunstein's arguments about the role of judicial review are the subject of serious counter-argument. Some legal theorists advocate a much more interventionist role for courts, arguing for its democratic pedigree and expressing faith in the capacity of judges to make good decisions on abstract matters.[38]

Sunstein acknowledges some of the arguments against him[39] but does not completely resolve them. He acknowledges that some judicial review is consistent with democracy and thus thinks that some matters ought to be taken out of political hands. In relation to constitutional interpretation, his view is that judicial review is most firmly grounded where "democratic processes in an existing government are most likely to break down or least likely to be reliable. ... If the right to vote is at stake, or the right to political speech, courts are more properly intrusive. So too when courts are asked to protect people who are at a systematic disadvantage in the democratic process".[40]

---

33 C R Sunstein, above n 1 at 180.
34 Ibid at 179-180.
35 Ibid at 181.
36 Ibid at 180-181.
37 E L Rubin, "Book Review: Legal Reasoning, Legal Process and the Judiciary as an Institution", (1997) 85 *Calif L Rev* 265 at 276-277.
38 For a summary of such arguments, see A Kaufman, "Incompletely Theorized Agreements : A Plausible Ideal for Legal Reasoning?" (1996) 85 *Geo L J* 395 at 397-401.
39 C R Sunstein, above n 1 at 175-76.
40 Ibid at 179.

But at least according to that general description, this approach to judicial review is potentially compatible with an activist court of the kind Sunstein appears not to want. Indeed, its emphasis on the importance of democratic processes and protecting the politically vulnerable resembles John Hart Ely's theory of constitutional interpretation[41] that has not been thought to be particularly deferential to the political branches.[42] So, even if we accept Sunstein' view of judicial review, it may be that he has not really established a case for a great deal of judicial deference. His own example shows this. Despite his preference for the democratic development of abortion rights, there is a good argument that abortion rights fall into the category of rights that he suggests should be protected. That argument would suggest that these laws target women, who are at a systematic disadvantage in the democratic process, with the consequence that abortion rights cannot be left to democratic institutions. Sunstein has not resolved, therefore, the tension between the legitimate role he acknowledges for judicial review and his argument for restraint.

Further, his discussion of courts' incapacity to achieve social reform is rather cursory, consisting primarily of references to Gerald Rosenberg's book, *The Hollow Hope*.[43] Indeed, his conclusion on this matter is ultimately modest. He concedes:

> The claim that courts are ineffective in producing large-scale reform is a generalization, and it has the limits of all generalizations ... An ambitious ruling might announce an uncontestable high-level principle, and the announcement of the principle might be right even if courts lack implementing tools.[44]

And in considering the specific example of abortion rights, he can only speculate that the political process *may* have produced more creative solutions.[45]

Acceptance of a general preference for incomplete theorizing, therefore, depends on arguments which Sunstein has not completely established. Consistently with Sunstein's analysis, a judge, in a particular case, may have confidence in the effectiveness and propriety of judicial theorizing and consequently may view the enunciation of theory as more important that the practical and social benefits of incomplete theorization. Nonetheless, the discussion of incompletely theorized agreements remains important. Sunstein's identification of the benefits of incompletely theorized agreements has brought to the fore the idea that judges might avoid statements of ambitious theory, not simply because they have failed to resolve them satisfactorily, but because of the distinctive virtues of this style of reasoning. Sunstein's account, should alert judges to the possibly divisive effect of their decisions and inspire some doubts as to the effectiveness of their intervention. With these insights, judges will want to consider Sunstein's arguments before they make large theoretical commitments.

Incomplete theorization and the High Court of Australia

I want now to consider how Sunstein's theoretical perspective might transform decision-making in the High Court. Perhaps taking a leaf from Sunstein's book, I will avoid the ambitious task of considering how, as a general matter, the High Court ought

---

41 J H Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).
42 See R A Posner, "Democracy and Distrust Revisited", 77 *Va L Rev* 641 (1991).
43 G N Rosenberg, *The Hollow Hope* (1991). C R Sunstein, above n 1 at 45.
44 C R Sunstein above n 1 at 45-46.
45 Ibid at 180-181.

to weigh up the competing claims of incomplete and high level theorizing. Instead, I will consider one series of cases in which there has recently been a shift from high level theorizing to a more cautious approach: the freedom of political communication cases.

It is perhaps not surprising that the freedom of political communication should raise the tension between high level theory and less ambitious reasoning. As Sunstein's examples suggest, there has been much debate in the United States over the theoretical underpinnings of freedom of speech.[46] In its earliest decisions on the freedom of political communication, the High Court joined the debate, justifying the freedom of political communication on the basis that it protected representative democracy. Although this was in turn implied from the structure and text of the Constitution,[47] this approach appeared to bring with it a high level justification of the freedom of political communication. The notion that freedom of speech supports democracy is a commonly advanced philosophical justification of First Amendment jurisprudence in the United States.[48] Moreover, its particular content is much debated. One account of the relationship between freedom of speech and democracy, which so far dominates in the United States, entails a very high degree of protection of speech. As some scholars have explained it, this suspicion of government is justified on the basis that freedom of speech serves democratic government by preventing authoritarianism implemented though control of ideas.[49] However, some American scholars, including Cass Sunstein, who value freedom of speech for its capacity to promote public deliberation, have argued that the current American approach neglects the distorting effect of existing inequalities in access to information and the capacity to communicate.[50] This view is much less suspicious of government regulation of speech since it recognises that a truly full and fair discussion of public affairs may actually require government intervention.

In the light of these competing explanations, the High Court's adoption of the idea that the freedom of communication serves democratic government required it to make some important choices. Initially, many aspects of the Court's position on the freedom of political communication echoed the more protective approach. Its influence could be seen in the adoption, by some Justices, of a test for the validity of regulation of political communication close to the American "strict scrutiny" requirement[51] and in the former Chief Justice's expression of scepticism in the use of regulation to improve the quality of political discourse.[52] It continued in *Theophanous v Herald and Weekly Times*.[53] Despite

---

46 See below nn 49-50 and accompanying text.

47 *Australian Capital Television v The Commonwealth*, (1992) 177 CLR 106; *Nationwide News v Wills*, (1992) 177 CLR 1.

48 Alexander Meiklejohn was perhaps the principal exponent of this theory of free speech. See A Meiklejohn, *Free Speech and its Relation to Self Government* (1948). See also, *Mills v Alabama*, 384 US 214, 218 (1966); *Buckley v Valeo*, 424 US 1, 14 (1976). See generally, F Schauer, above n 21 at 35-46; K Greenawalt, above n 21 at 145-46.

49 This argument is most fully explained by F Schauer, above n 21 at 33-34. See also, V Blasi, "Reading Abrams through the Lens of Schauer" (1997) 72 *Notre Dame L Rev* 1343.

50 See O Fiss, "Free Speech and Social Structure", (1986) 71 *Iowa L Rev* 1405; C R Sunstein, *The Partial Constitution* (1993) at 203-213.

51 *Australian Capital Television* (1992) 177 CLR 107 at 143 per Mason CJ; at 234-235 per McHugh J.

52 Ibid at 145 per Mason CJ, echoing the concerns of the Supreme Court in *Buckley v Valeo*, 424 US 1 at 48-49 (1976).

53 (1994) 182 CLR 107.

the High Court's modification of the *New York Times v Sullivan*[54] rule in response to criticism of that rule,[55] aspects of the decision shows the influence of the sceptical American tradition.[56] A central feature of the *New York Times* opinion is the protection of *false* defamatory information out of a belief that the injury to reputation it inflicts is not sufficient to justify regulation of speech by the law of libel.[57] This aspect of the American tradition, adopted by the High Court in *Theophanous*,[58] reflects a belief, sometimes expressed as a belief in the "market place of ideas",[59] that information is best regulated by competition between ideas rather than by government action.[60]

Thus, by preferring the restrictive American approach, the High Court initially chose a vision of freedom of political communication which has serious critics. It took sides, perhaps even unwittingly, in a controversial debate, conducted at the level of high theory, opening itself to the criticisms that Sunstein suggests: that it unnecessarily risked alienating those with a differing theoretical perspective and that it inappropriately excluded democratic participation.

Despite the influence of the United States approach on some judges, however, other members of the High Court advanced a competing view of the freedom of political communication which stressed that the content of the implication was to be construed *only* by reference to text and structure.[61] The triumph of this approach was ensured by the recent High Court decision in *Lange v The Australian Broadcasting Corporation*,[62] the case which reconsidered and reformulated the High Court's previous decisions in *Theophanous v. Herald and Weekly Times*[63] and *Stephens v West Australian Newspapers*.[64] In *Lange*, the Court stated:

> [T]he Constitution gives effect to the institution of "representative government" only to the extent that the text and structure of the Constitution establish it ... the relevant question is not, "What is required by representative and responsible government?" It is, "What do the terms and structure of the Constitution prohibit, authorise or require?"[65]

---

54 376 US 254 (1964).

55 In summary, the High Court rejected the American decisions extending the notion of "a public figure" beyond public officials and candidates for public office. *Theophanous*, (1994)182 CLR 107 at 134, placed the onus of proof on the defendant and substituted the "reasonableness" test for the "actual malice" standard (1994) 182 CLR 107 at 135.

56 I have made this point in detail in A Stone, *Freedom of Political Communication, the Common Law and the Constitution*, forthcoming.

57 376 US 254, 279 (1964).

58 (1994) 182 CLR 107 at 138.

59 See *Abrams v United States*, 250 US 616, 630 (1919) (Holmes, J dissenting). See generally, K Greenawalt, above n 21, at 130-141; F Schauer, above n 21 at 15-34.

60 The contrary view might be that a truth requirement in the law of defamation would advance free speech values by ensuring accurate reporting in the first place. See M Chesterman, "The Money or the Truth" (1995) 18 *UNSWLJ* 200 at 307-308.

61 This was the basis of Justice McHugh's dissent in *Theophanous v Herald and Weekly Times* (1994) 182 CLR 107 at 199 and 205. See also *McGinty v West Australia*, (1996) 186 CLR 140 at 169 per Brennan CJ; at 232-235 per McHugh J; at 291 per Gummow J.

62 (1997) 145 ALR 96

63 (1994) 182 CLR 107.

64 (1994) 182 CLR 211.

65 (1997) 145 ALR 96 at 112.

The Court, therefore, began its consideration of the implied freedom of political communication with constitutional text and held that it protected only those aspects of representative democracy which can be identified in the text. The Court specified three features of representative democracy which are grounded in the text and thus protected by the freedom of political communication: the representative nature of the Parliament, which requires the protection of communication "which enables the people to exercise a free and informed choice as electors";[66] responsible government, which implies "a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament";[67] and amendment by referendum, which requires the protection of communication "that might be relevant to the vote [electors] cast in a referendum to amend the Constitution".[68]

Significantly for these purposes, *Lange* produced a much less theorized vision of the freedom of political communication. By tying the content of the freedom of political communication closely to the text of the Constitution, the High Court identified specific circumstances in which the freedom of political communication operates, without providing a theory of the freedom. Although the freedom exists to support some aspects of representative democracy, the High Court has not fully explained the nature of representative democracy nor how free political communication might support it.

Of course, as my arguments above show, the incompletely theorized nature of the Court's new approach to the freedom of political communication brings with it some costs. Those who think the High Court's initial vision of freedom of communication was the best view of freedom will decry the Court's new direction. Those who value strong rhetorical statement about free speech values will also be disappointed by the development of a less ambitious explanation. Sunstein's contribution, however, is to identify the distinctive virtues of the approach. Although I have refrained from taking a general view of the appropriateness of Sunstein's theory of preference for incomplete theorizing, I do suggest there is much to recommend this approach in the case of the freedom of political communication. This is an area in which the High Court might benefit from experience. The need for caution is suggested by the controversy that freedom of speech has engendered elsewhere, especially in the United States, the country with the longest tradition of constitutionally protected free speech; by the serious competing visions of freedom of speech among which the High Court would have to choose; and by the comparative novelty of this area of Australian constitutional law. An initial preference for incomplete theorization gives the High Court the opportunity to see its decisions applied by lower courts and operate in practice as well as the chance to consider carefully the critical evaluation of its work, before it makes the important choice of philosophical justification for the freedom.

As a final point, it should be noted that the High Court does not, of course, justify its decision in this way. The High Court's view is that, as a matter of constitutional theory, the Constitution can only be interpreted by reference to text and structure.[69]

---

66 Ibid at 107.
67 Ibid.
68 Ibid.
69 Ibid at 112. This is of itself an ambitious theoretical position as McHugh J acknowledged in *McGinty* (1996) 186 CLR 140 at 230). By the same token, Sunstein's advocacy of incomplete

Thus, the High Court has not precluded reference to an underlying or overarching theoretical commitment because of the concerns which motivate Sunstein: the difficulties of decision-making, social cohesion and the relative competence of courts and the elected arms of government. Nonetheless, for those who are not so far attracted to the Court's position, Sunstein provides an alternative rationale for its approach.

CONCLUSION

Thus, *Legal Reasoning and Political Conflict* introduces the notion that theoretical modesty has an inherent value in judicial decision-making. This contribution, I have suggested, could transform our assessment of recent developments in the High Court's interpretation of the freedom of political communication. Sunstein provides arguments that support a cautious, incremental approach to the freedom of political communication and, in this light, the High Court's decision in *Lange* may be attractive, even if we do not share the High Court's rationale for its interpretive approach. Indeed, I have suggested that Sunstein's argument for incomplete theorizing has particular power where, as in the case of the freedom of political communication, the High Court is venturing into a new, complex and controversial area.

Sunstein's theory therefore responds to the challenge of deciding complex moral and political issues. This gives it particular resonance in Australia where the High Court, like its United States counterpart, faces the challenge of judicial decision-making in a diverse society. More prosaically, Sunstein's sensitivity to the real life constraints on the time and capacity of judges and their obligation to rely on established methods of reasoning means that incomplete theorization might realistically appeal to judges. Perhaps this above all, makes *Legal Reasoning and Political Conflict* worthy of serious scholarly and judicial attention.

advocacy of incomplete theorizing requires ambitious theoretical commitment to that position. See C R Sunstein, above n 1 at 60.